87-2064

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE B.F. GOODRICH COMPANY,

Petitioner,

v.

THOMAS HAROLD LAKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision directly conflicts with this Court's decisions in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and *Ansonia Board of Education v. Philbrook*, 479 U.S. ___, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986), by striking as mere "surplusage" and "extraneous findings" a portion of the district court opinion which evidenced its mistaken view of the law regarding the nature and extent of an employer's duty to accommodate an employee's religious beliefs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17.

2. Whether the court of appeals' decision directly conflicts with *Hardison* and *Philbrook* by affirming a district court decision that failed to analyze Petitioner's accommodation of Respondent's religious beliefs under the *de minimus* cost standard and ruled that in order to relieve Respondent from working on his sabbath, Petitioner was compelled (1) to hire substitutes to work Respondent's shift; (2) to violate its understanding with the union and the seniority rights of other employees by unilaterally returning Respondent, a managerial employee, to the collective bargaining unit; or (3) to allow Respondent to use vacation days or holiday time on his sabbath, thereby forcing Petitioner to operate his shift without coverage, to pay premium wages for a substitute, or to compel other employees to work in his place.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit and in this Court are listed in the caption of the action.[1]

[1] The Uniroyal Goodrich Tire Company is the successor-in-interest to The B.F. Goodrich Company, the named Petitioner herein. The Uniroyal Goodrich Tire Company is owned by Goodrich Tire, Inc., Automotive Proving Ground, Inc., and Uniroyal Tire Company, Inc. The Uniroyal Goodrich Tire Company also has partial ownership of Compania Hulera Euzkadi, S.A. and Kabushiki Kaisha Mobex Corp., Japan.

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THOMAS HAROLD LAKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the United States Supreme Court:

The B.F. Goodrich Company, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled case on February 11, 1988.

OPINIONS BELOW

The opinion of Court of Appeals for the Eleventh Circuit is reported at 857 F.2d 449 (11th Cir. 1988) and is printed as Appendix A hereto. The opinion and judgment order of the United States District Court for the Northern District of Alabama is unreported

and is printed as Appendix B hereto. The denial by the court of appeals of a petition for rehearing and suggestion for rehearing *en banc* is unreported and is printed as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 11, 1988. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 21, 1988. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) provides:

> (j) The term "religion" includes all aspects of religious observation and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observation or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a)(1) provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Respondent alleges that Petitioner violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, by failing to provide reasonable accommodation of his religious beliefs and discharging him from employment on July 26, 1983.

There are few factual disputes. The district court found that Respondent was one of only three electrical instrument foremen employed in the "curing room" of Petitioner's tire production plant, that electrical foremen had specialized knowledge that was necessary for proper performance and "especially important to production" (App. B at 4), and that one electrical foreman was assigned to each of the three production shifts. When one electrical foreman was absent, each of the other two worked four hours extra on his shift to cover the absence. If the other foremen were unable to work overtime, the shift generally was covered by a supervisor. *Id.* A mechanical foreman was also assigned to each shift and the Company sometimes operated with only one foreman on duty, but the district court found that "in fact both were needed." *Id.*

The evidence reflected that when Respondent joined the Seventh Day Adventist Church, he was working the 3:00 p.m. to 11:00 p.m. shift, Monday through Friday. He objected to working between sunset Friday and sunset Saturday, and was transferred to the first available vacancy on the 11:00 p.m. to 7:00 a.m. shift in February 1982, so that his regular workweek required no work during that period. Between February 1982 and July 1983, Respondent was never scheduled to work on Friday evenings or Saturdays,

nor was he required to assist Petitioner in arranging for a substitute. Respondent was excused from working 49 "maintenance Saturdays" in 1982 and 1983, which the other electrical foremen worked, and from covering for other electrical foremen on Friday evenings or Saturdays.

In early 1983, business improved and the Company began scheduling production seven days per week. In addition to working on maintenance Saturdays, the electrical foremen were scheduled to work on production Saturdays and Sundays. Respondent was not required to work on the first four production Saturdays in 1983. Petitioner scheduled the other two electrical foremen to cover Respondent's shift on two of the Saturdays, and operated without an electrical foreman on his shift on the other two Saturdays. As a result, the other electrical foremen complained to management and to Respondent himself about the additional overtime required to cover his absences on production Saturdays. On the two Saturdays that production proceeded without an electrical foreman covering Respondent's shift, Petitioner suffered increased "scrap" and lost efficiency, causing production managers to complain about production disruptions and resulting economic losses.

At this juncture, Petitioner advised Respondent that it could not compel the other foremen to continue covering his shift and could not run the shift without an electrical foreman on duty. Respondent suggested that he assist in providing coverage by arranging for voluntary substitutes, and Petitioner agreed. On July 22, 1982, the very first time that Respondent was responsible for arranging coverage, he failed to pro-

vide a substitute foreman for half of his shift and Petitioner had to cover the shift with a supervisor.

As summarized in the dissenting opinion to the Eleventh Circuit's decision, at this point, Petitioner had taken the following actions to accommodate Respondent during the nineteen-month period after he had requested accommodation:

> (1) Attempting to arrange a transfer to the first shift to relieve him from working Friday evenings after sundown;
>
> (2) Transferring him to the first available vacancy on the first shift, thereby allowing him to work a full week without Friday evening or Saturday work;
>
> (3) Excepting him from work on Saturday "maintenance" days during 1982 and 1983, although the maintenance department worked at least 49 Saturdays during that period;
>
> (4) Excepting him from work on production Saturdays during the first three and one-half months of 1983 when production weekends began;
>
> (5) Arranging alternative coverage or operating without an electrical instrument foreman for four hours on Friday evenings so that he would not have to work;
>
> (6) Excusing him from covering a portion of a vacationing foreman's shift, although such coverage is normally required;
>
> (7) Scheduling other foremen to work twelve-hour shifts and paying them premium wages to cover for him on Fridays and Saturdays;

> (8) Operating his shift without a foreman, resulting in decreased production and efficiency;
>
> (9) Advising him that it was willing to consider any reasonable alternatives he could propose;
>
> (10) Allowing him to obtain replacements for himself to cover portions of his shift;
>
> (11) Holding several meetings among managers and supervisors to discuss potential methods of accommodation.

Lake v. B. F. Goodrich Co., 837 F.2d 449 at 453-4 (11th Cir. 1988) (Hill, J., dissenting).

After Respondent failed to provide a substitute for half of his shift on July 22, 1983, another meeting was held between Respondent, his supervisors, and the Employee Relations Manager to determine whether any other alternatives for resolving the scheduling conflict existed. None of the parties, including Respondent, were able to suggest any further means of accommodation, and Respondent was advised that Petitioner had no alternative but to terminate his employment.

Based on these facts, the district court concluded that Petitioner had made "some effort" to accommodate Respondent, but that the effort fell "short of that required by law" (App. B at 8). Although extensive evidence was presented proving the costs Petitioner incurred in accommodating Respondent, the district court made no findings whatever under the *de minimus* cost standard. Instead, the district court harshly criticized Petitioner's business practices and

opined that Petitioner could have resolved the issue easily by hiring substitute foremen:

> The court has heard the evidence about this and finds that to work so many hours in a week not only was dangerous from a safety standpoint, but was extremely inefficient use of the persons involved. They simply could not function well working a 12-hour day with no days off. To the court's mind, to exploit men this way is unthinkable, certainly unreasonable. *For the company's own benefit, it should have trained substitutes or temporary or weekend foremen.* Almost any other plant in our industrial nation would have been operated with substitutes for foremen who had to be off. Almost any other plant in this nation would have had trained men ready to step in when needed. Not this defendant. This defendant claims undue hardship in accommodating this plaintiff's religious belief, but *if it had simply acted in its own interest and had trained men ready to substitute, the accommodation would have been simplicity itself.*

(App. B at 5) (emphasis supplied).

In addition to hiring substitute foremen, the district court proposed two other alternatives which it believed Petitioner could have been implemented to provide further accommodation; returning Respondent, a managerial employee, to the collective bargaining unit in violation of its long-standing agreement with the union, or allowing Respondent to take vacation days or holiday time on production Saturdays, thus re-

quiring other foremen to cover for him or operating without coverage. The court also ruled that by accepting Respondent's assistance "in the end" (App. B at 8) to arrange for voluntary substitutes for his shift, Petitioner unlawfully shifted its burden of accommodation to Respondent.

The court of appeals did not address Petitioner's argument that the district court decision was based on an erroneous view of the law and that as a matter of law, Petitioner was not required to incur more than *de minimus* cost or to implement the alternatives proposed by the district court. Instead, the panel majority couched the issues as factual and approved the decision under the "clearly erroneous" standard of review. The panel found that "the District Court stepped beyond its proper role under Title VII by making findings of fact concerning how appellant should operate its business", 837 F.2d at 450, but ignored the district court's underlying misconception of the law.

REASONS FOR GRANTING THE WRIT

The writ should be granted to clarify the legal standard to be applied by lower courts in determining whether an employer has met its obligation to provide reasonable accommodation of employees' religious beliefs under Title VII. The district court's opinion and the Eleventh Circuit's affirmance of the decision are contrary to *Hardison* and *Philbrook* and raise substantial questions and confusion regarding the nature and extent of an employer's obligation to accommodate the scheduling preferences of employees who decline to work on certain days for religious reasons.

The issues raised by this petition are not mere factual disputes. The district court opinion affirmed by the Eleventh Circuit reveals on its face an erroneous view of the law and a fundamental misconception of the trial court's role in religious accommodation cases. Under the district court's view, the employer must "... make every reasonable effort to accommodate" (App. B, at 10), without regard to undue hardship. The district court made no reference to *Hardison*, the *de minimus* cost standard, or the necessary, delicate balancing of the individual's rights with the employer's business needs and the rights of other employees.

The decision imposes upon employers obligations that far exceed what is warranted or sanctioned under *Hardison* and *Philbrook*. *Hardison* established that in accommodating an employee's religious beliefs, an employer is not required to incur undue hardship through lost efficiency or higher wages, 432 U.S. at 84, to discriminate against other employees by requiring them to work in place of the individual seeking accommodation, *id.* at 81, to contravene the shift preferences or seniority rights of others, *id.*, to pay premium wages to obtain alternative coverage, *id.* at 84, or to operate a shift without the presence of an employee whose position is essential, *id.* at 68. Petitioner tried each of these alternatives, and each ultimately proved an undue hardship to other employees and Petitioner's business operations.

The court of appeals discussed the applicable legal standard in its opinion, but failed to examine whether the district court applied the standard in reaching its conclusion. The appellate court admonished the district court for overstepping its authority under Title

VII by "making findings of fact concerning how [Petitioner] should operate its business." Nevertheless, the panel majority trivialized the issue by striking these findings as "surplusage" and "extraneous". In fact, the purged statements formed the heart and underlying rationale of the district court's decision and clearly demonstrated its erroneous view of the law. This erroneous view infected the entire decision and was not "cured" merely by excising the most offensive passage of the opinion.

The district court ruled that Petitioner unlawfully transferred its burden of accommodation to Respondent because it accepted his assistance "in the end" to arrange coverage, in effect finding that placing any affirmative obligation on Respondent to assist in the accommodation was unlawful. The court of appeals approved the district court's reasoning that because Petitioner "ultimately made [Respondent] responsible for arranging replacements," it failed to meet its duty to accommodate. 837 F.2d 449 at 452. This conclusion is directly contrary to the finding in *Philbrook* that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of an employee's religion and the exigencies of the employer's business". 93 L. Ed. 2d at 315, *quoting Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-6 (5th Cir. 1982).

The district court also concluded that Petitioner's efforts were inadequate because three additional alternatives could have been implemented to resolve the conflict. This analysis is directly contrary to *Philbrook*, which established that the district courts should determine the adequacy of an employer's accommodation under *Hardison*, rather than requiring the em-

ployer to refute every proposed alternative means of accommodation. As Judge Hill explained in his dissent to the majority decision in this case, "so long as the [employer's] actions constituted reasonable accommodation, the district court's enumeration of its own list of alternatives at trial was irrelevant." 837 F.2d at 454.

Both the district court and the court of appeals ignored the fact that the three alternatives proffered by the district court were neither required nor permitted by law. Under *Hardison* and *Philbrook*, Petitioner was not compelled to hire an additional foreman to substitute for Respondent, to contravene its agreement with the union and disregard other employees' seniority rights by returning him to the bargaining unit, or to incur additional undue hardship by operating without coverage, paying premium wages, or discriminating against other workers in order to permit Respondent to use vacation and holiday on production Saturdays. *See EEOC v. Ithaca Industries, Inc.*, 829 F.2d 519 (4th Cir. 1987), *rehearing granted* (employer not required to discriminate against other workers by compelling them to work for objecting employee); *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984) (employer not required to contravene seniority rights of other workers or to pay premium wages to obtain coverage for objecting employee); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141 (5th Cir. 1982) (employer not required to hire a substitute, to operate shift without coverage, or to compel other employees to cover for objecting employee); *United States v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (employer not required to operate

shift without coverage or to compel other employees to cover for objecting employee).

CONCLUSION

The decision in this case directly conflicts with this Court's decisions in *Hardison* and *Philbrook*. It imposes a far greater burden of accommodation upon employers than has been recognized or sanctioned by the decisions of this Court, and directly contravenes this Court's ruling that an employer is not required to discriminate against other workers or to incur more than *de minimus* cost in order to accommodate an individual's religious practices. The writ should be granted to clarify the requirements of Title VII, to advise employers as to how to meet their obligations, and to guide the lower courts in analyzing religious accommodation cases.

WHEREFORE, Petitioner respectfully requests that the writ be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.

Nos. 86-7671, 86-7772.

THOMAS HAROLD LAKE,
Plaintiff-Appellee,

v.

B.F. GOODRICH COMPANY,
Defendant-Appellant.

Feb. 11, 1988

In Title VII action, the United States District Court for the Northern District of Alabama, No. CV85-G-0628-W, J. Foy Guin, Jr., J., found that employer discriminated against its employee on basis of his religion, and employer appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) evidence supported findings that employer made no real effort, and no good-faith effort, to find accommodation for employee, and that employer could have accommodated employee's religious beliefs without undue hardship, and (2) Court of Appeals would ignore surplus findings commenting on inefficiency and danger of employer's method of operation of business, and affirm judgment imposing liability on employer.

Affirmed.

Hill, Circuit Judge, dissented and filed opinion.

Appeals from the United States District Court for the Northern District of Alabama.

Before HILL and VANCE, Circuit Judges, and PROPST*, District Judge.

VANCE, Circuit Judge:

In this Title VII case defendant B.F. Goodrich Company appeals the district court's finding that the company discriminated against its employee Thomas Lake on the basis of his religion. The district court found that appellant neither made a good faith effort to accommodate plaintiff's religious beliefs nor proved it was unable to accommodate plaintiff without undue hardship.[1] In the course of making these findings, the district court stepped beyond its proper role under Title VII by making findings of fact concerning how appellant should operate its business. Although we must disapprove these findings, we affirm the judgment because the district court's essential findings of fact are not clearly erroneous.

I.

Appellee Lake had been an instrument mechanic in appellant's tire plant for several years, when he was promoted to an electrical instrument maintenance foreman in 1979. In 1981 he joined the Seventh Day Adventist Church. The district court found that Lake's sincere beliefs as a member of the Seventh Day Adventist Church precluded him from working on his sabbath (sundown Friday to sundown Saturday) because "adherents of that faith cannot work during those hours without losing their good standing and endangering their immortal souls." At this time Lake worked the third shift from 3:00 p.m. to 11:00 p.m., meaning that he was scheduled to work for part of his sabbath.

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* Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] There is no dispute that Lake's religious beliefs were sincere, and that he established a *prima facie* case of discrimination.

Those are all the undisputed facts. The rest of the case revolves around events the parties describe quite differently and to which the parties ascribe very different significance. For example, in February, 1982 appellant transferred Lake to the first shift, which enabled him to avoid working regular shifts during his sabbath. Appellant claims that this was a move to accommodate Lake's religious beliefs, while Lake claims that the transfer occurred accidentally and for reasons wholly unconnected to accommodating his religious beliefs.

In 1983 appellant, responding to an increase in the demand for tires, commenced intermittent full production on weekends. Appellant began to schedule Lake and the other electrical foremen for a seven day work week. The two other electrical foremen worked twelve hour shifts several Saturdays to cover for Lake.[2] In May and July there were meetings between Lake and various management officials to discuss solutions to the problems caused by Lake's inability to work Friday nights or Saturdays.[3] Finally, on Saturday, July 23 four hours of Lake's shift went uncovered.[4] At a meeting on July 26 the personnel director terminated Lake.

[2] Lake was an electrical instrument foreman who worked in Area III of the plant, the curing room, along with a janitor foreman and a mechanical foreman. It is factually disputed whether foremen from another department can cover for an electrical foreman, or whether a shift can operate with less than all craft foremen present. Appellee asserts that these kinds of accommodations are not unusual and have occurred in the past without incident. Appellant asserts that having an electrical foreman on each shift is critical to the efficiency and safety of the plant.

[3] There is a factual dispute surrounding these meetings. Appellant cites to the number of these meetings as evidence of its efforts to accommodate appellee. Appellee cites to the content of these meetings as evidence of appellant's failure to accommodate appellee.

[4] The facts surrounding why the shift went uncovered are vigorously disputed. Appellant's version is that appellee had been attempting to get a maintenance foreman from Area II to cover on July 23, but failed

II.

Title VII requires that an employer "make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75, 97 S.Ct. 2264, 2272, 53 L.Ed.2d 113 (1977); *see Ansonia Bd. of Educ. v. Philbrook*, ___ U.S. ___, 107 S.Ct. 367, 369 & n. 1, 93 L.Ed.2d 305 (1986); 42 U.S.C. § 2000e(j).[5] The statutory language does not make clear the precise reach of this obligation. *Hardison*, 432 U.S. at 75-76, 97 S.Ct. at 2272; *see Philbrook*, ___ U.S. ___, 107 S.Ct. at 371-73. The Supreme Court, however, has held that to require an employer to bear greater than a *de minimis* cost in accommodating an employee's religious beliefs constitutes undue hardship. *Philbrook*, ___ U.S. at ___, 107 S.Ct. 371; *Hardison*, 432 U.S. at 84, 97 S.Ct. at 2276-77; *see Wisner v. Truck Central*, 784 F.2d 1571, 1573 (11th Cir.1986); *Benefield v. Food Giant, Inc.*, 630 F.Supp. 78, 79 (M.D.Ga.1985), *aff'd.* 792 F.2d 1125 (11th Cir.1986); *Murphy v. Edge Memorial Hosp.*, 550 F.Supp. 1185, 1187-88 (M.D.Ala. 1982).

Our inquiry in this case is whether the district court's factual findings are clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 580, 105 S.Ct. 1504, 1511, 1515, 84 L.Ed.2d 518 (1985); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1129 (11th Cir.1984).

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to follow through with the final arrangements. Appellee's version is that appellee did everything he possibly could, and that appellant had sufficient advance notice that several hours of the Friday night shift were uncovered. The district court credited appellee's version of these events.

[5] 42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonable accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

In Title VII cases the district court's findings on discrimination may not be reversed unless the court of appeals concludes that the findings are clearly erroneous. *Anderson*, 470 U.S. at 573-74, 105 S.Ct. at 1511; *Pullman-Standard v. Swint*, 456 U.S. 273, 290, 102 S.Ct. 1781, 1791, 72 L.Ed.2d 66 (1982). In particular "[t]he findings of undue hardship and more than de minimus cost are to be upset only if they are clearly erroneous." *Wisner*, 784 F.2d at 1573; *see Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir.1984); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982).

On appeal appellant argues that it initially made an effort to accommodate Lake's religious observances by transfering Lake to the first shift when the first available vacancy occurred. Appellant contends that its other accommodation actions included scheduling other foremen for "maintenance days"[6] and excusing Lake from covering for absent foremen whenever the additional hours would require Lake to work on his sabbath. Appellant states that it arranged for other electrical foremen to replace Lake on certain production Saturdays. Finally, appellant points out that the company attempted to operate the plant without an electrical foreman on weekend production days prior to Lake's termination, but this caused numberous production problems. Lake, on the other hand, argues that after his initial objection to a production shift schedule requiring him to work on his sabbath, appellant indicated that Lake was to arrange for someone to cover his scheduled shifts. As a result Lake believed that appellant "was willing to do nothing at all to accommodate him."

While the evidence in this case is controverted, the district court found that appellant "made no real effort, cer-

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[6] Appellant periodically scheduled "maintenance days" to repair and maintain its equipment. "Maintenance days" typically were scheduled for Saturdays because the maintenance work would not interfere with production.

tainly not a good faith effort, to find an accommodation" for appellee.[7] The court reasoned that appellant apparently failed to understand that the company had the burden to accommodate Lake's religious observances because appellant ultimately made Lake responsible for arranging replacements. The district court also explicitly found that appellant could have accommondated Lake's religious beliefs without undue hardship.[8]

These findings are not clearly erroneous. In *Anderson*, the Supreme Court explained:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where that are two permissible view of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> . . . .
>
> Based on our own reading of the record, we cannot say that either interpretation of the facts is illogical

---

[7] The district court added:

> [T]his court finds from the evidence that there was a distinct lack of sympathy for Mr. Lake's religious view and that the company did not make a good faith effort to accommodate that view. The company had a "don't care" attitude.

[8] Some courts have broken down the analysis explicitly into (1) whether the employer made good faith efforts to find an accommodation, and (2) whether the employer proved that the efforts were unsuccessful because of undue hardship. *See. e.g., Getz v. Pennsylvania Dep't of Pub. Welfare*, 802 F.2d 72, 73 (3rd Cir.1986); *Proctor v. Consol. Freightways Corp. of Delaware*, 795 F.2d 1472, 1475 (9th Cir. 1986). We note that the district court found that appellant failed to prove both.

> or implausible. Each has support in inferences that may be drawn from the facts in the record: and if either interpretation had been drawn by a district court on the record before us, we would not be inclined to find it clearly erroneous.

470 U.S. at 574-77, 105 S.Ct. at 1511-13. We find ourselves precisely in this situation on this appeal. Counsel for both sides have presented the facts in the light most favorable to their respective clients. The district court, however, resolved the factual conflict in favor of Lake. As the Third Circuit noted in a similar case: "[A]though we are inclined to believe the hardship question was considerably closer than the district court did, we cannot say that its factual determinations, based on its assessment of the witnesses' credibility and its familiarity with the evidence, are clearly erroneous." *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 135 (3rd Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986). We therefore affirm the district court's judgment on the basis of these findings.

The district court made additional findings of fact concerning how appellant should have conducted its business affairs. Commenting on the overtime hours of the tire plant foremen, the district court wrote in its memorandum opinion:

> The court has heard the evidence . . . and finds that to work so many hours in a week not only was dangerous from a safety standpoint, but was extremely inefficient use of the persons involved. They simply could not function well working a 12-hour day with no days off. To the court's mind, to exploit men this way in unthinkable, certainly unreasonable. For the company's own benefit, it should have trained substitute or temporary or weekend foremen. Almost any other plant in our industrial nation would have been operated with substitutes for foremen who had to be

> off. Almost any other plant in this nation would have had trained men ready to step in when needed. Not his [sic] defendant. This defendant claims undue hardship in accommodating this plaintiff's religious belief, but if it had simply acted in its own interest and had trained men ready to substitute, the accommodation would have been simplicity itself.

We agree with appellant that Title VII does not require an employer to operate its business in a manner the district court considers safe and efficient. *Cf. Hardison*, 432 U.S. at 84-85, 97 S.Ct. at 2276-77 (disapproving of requiring an employer to finance additional days off for employees with certain religious beliefs); *Wisner*, 784 F.2d at 1574 (employer can adjust its operations as it deems appropriate to make up for the services of a discharged employee without incurring liability for a Title VII violation). We therefore disapprove of these extraneous findings.

The district court, however, made the minimum requisite findings for imposing Title VII liability and these findings are not clearly erroneous, we therefore ignore the surplusage in the district court's opinion and affirm its judgment.

AFFIRMED.

HILL, Circuit Judge, dissenting:

Appellee's religious beliefs prevented him from working Friday evenings and Saturdays, although his position frequently called for such work. Upon learning of this restriction, appellant did not terminate the appellee, but instead attempted to accommodate him through the following actions:

(1) Attempting to arrange a transfer for appellee to the first shift to relieve him from working Friday evenings after sundown;

(2) Transferring appellee to the first available vacancy on the first shift, thereby allowing him to work a full week without Friday evening or Saturday workday;

(3) Excepting appellee from work on Saturday "maintenance" days during 1982 and 1983, although the maintenance department worked at least 49 Saturdays during that period;

(4) Excepting appellee from work on production Saturdays during the first three and one-half months of 1983 when production weekends began;

(5) Arranging alternative coverage or operating without an electrical instrument foreman for four hours on Friday evenings so that appellee would not have to work;

(6) Excusing appellee from covering a portion of a vacationing foreman's shift, although such coverage is normally required;

(7) Scheduling other foremen to work twelve hour shifts and paying them premium wages to cover for appellee on Fridays and Saturdays;

(8) Operating appellee's shift without a foreman resulting in decreased production and efficiency;

(9) Advising appellee that it was willing to consider any reasonable alternatives he could propose;

(10) Allowing appellee to obtain replacements for himself to cover portions of his shift;

(11) Holding several meetings among managers and supervisors to discuss potential methods of accommodation.

Immediately prior to his termination, appellee assured his employer that he would work with his fellow foremen to arrange coverage for his shifts. Appellant agreed to this further accommodation. On Saturday, July 23, 1983, appellee failed to find a substitute for half of his shift, failed to show up for work, and failed to inform appellant that half of his shift would not be covered. Only then was appellee terminated.

Under *Ansonia Bd. of Educ. v. Philbrook*, ___ U.S. ___, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986), when an employer offers a reasonable accommodation of an employee's religious beliefs, the employer satisfies its duty and is not required to consider every available alternative. Thus, so long as the above-described actions constituted reasonable accommodation, the district court's enumeration of its own list of alternatives was irrelevant.

I believe that the above-described efforts clearly constituted a reasonable accommodation and that the district court's finding to the contrary was clearly erroneous. I would reverse, and therefore I respectfully dissent from the majority's opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

THOMAS HAROLD LAKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 85-G-0628-W
B. F. GOODRICH COMPANY,	)	
	)	
Defendant.	)	

ENTERED
AUG 26 1986
FILED
AUG 26 1986

MEMORANDUM OPINION

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, alleging religious discrimination in employment. The plaintiff seeks reinstatement to a full-time position, back pay and lost benefits, and the costs of these proceedings including reasonable legal fees. The case was very well tried in a bench trial in June 1986, and has been exceptionally well briefed by able counsel for both sides.

The case arises because the plaintiff has become a member of the Seventh Day Adventist faith and cannot, consistent with his religious opinions, work between sundown Friday and sundown Saturday of any week. His faith teaches that the 24-hour period thus described is the sabbath and that adherents of that faith cannot work during those hours without losing their good standing and endangering their immortal souls. Emergencies are allowed

for, but only "true" emergencies, not events which are planned in advance, such as maintenance work done regularly on the sabbath or production days planned in advance, some part of which falls upon a sabbath. In other words, if it is not an emergency to the employer, completely beyond the employer's making, the employee cannot treat it as an exceptional circumstance, or "emergency," and thus be considered as not breaking the law of God when he works under such circumstances. There is no question about the good faith of the plaintiff. It is admitted that he has embraced these religious beliefs sincerely and that his position is one of necessity when seen against the backdrop of his belief that if he works during the sabbath hours he will be eternally lost.

Title VII was amended by the Congress in 1972 to add the subsection which is the legal foundation for the plaintiff's claim in this case. That subsection is set out in the footnote.[1] The Congress, through the enactment of this subsection, has expressed a national policy of the United States that employers accommodate religious beliefs of this kind, whenever possible without undue hardship on the employer.

It is the considered opinion of this court, after careful consideration of the exceptionally able briefs from both sides, that indeed the defendant could have accommodated the plaintiff's religious beliefs in one of at least three ways, without undue hardship. Consequently, the court will order relief for the plaintiff, including back pay, restoration of lost benefits, and restoration of the plaintiff either to the job from which he was terminated or to an instrument

---

[1] Title 42 § 2000e(j):

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonable accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

mechanic job in the bargaining unit. On proper application, the court will award attorneys' fees to the attorneys for the plaintiff, who have labored with extraordinary ability and dedication, and, of course, costs will be taxed against the defendant.

Mr. Lake was an instrument mechanic for the defendant for many years before he was promoted to electrical/instrument maintenance foreman. There is not a great difference in earnings between the two positions. Instrument mechanic, however, is within the bargaining unit, and the foreman's job is a management position.

Plaintiff began work as an instrument mechanic for the defendant in 1976. At that time, defendant employed about 2,000 employees at its Tuscaloosa plant. For three years plaintiff worked as an hourly employee, the normal work day consisting of an eight-hour shift, five days a week. Under the collective bargaining agreement, hourly employees could refuse overtime and therefore were not required to work on Saturday or Sunday. About 1979, Lake became an electrical/instrument maintenance foreman. At all times material to this case the company had just three such foremen in Area III. The company operated three shifts per day, and each of these three foremen was assigned to a different shift. There were never any relief or substitute foremen at any time. Each shift also had a mechanical foreman and there were times when the company would operate with only one of these two foremen present, but in fact both were needed. The electrical foreman could more easily cover for the mechanical foreman than the contrary. Specialized electrical knowledge was necessary to the proper performance of the electrical foreman's duties. In Area III these duties were especially important to production. When one of the three electrical foremen was absent, whether by reason of illness or vacation, or for whatever reason, usually the other two foremen worked an extra four hours. If this proved to be impossible, one of the supervisors had to work as electrical

foreman. In 1983 the company began having work scheduled seven days a week. That is also true at the present time, but since 1983 the company has changed its system. There are now four shifts which alternate in such a way that each of them is scheduled to work a five-day week. There are therefore four electrical/instrument maintenance foremen rather than three.

When there were only three such foremen, when the seven-day week was the norm and when one of them was on vacation or sick, each of the other two had to work an 84-hour week (12 hours a day for seven days). They of course received overtime for work on Saturday and double time for work on Sunday, but they had no option about working such extremely burdensome hours. The court has heard the evidence about this and finds that to work so many hours in a week not only was dangerous from a safety standpoint, but was extremely inefficient use of the persons involved. They simply could not function well working a 12-hour day with no days off. To the court's mind, to exploit men this way is unthinkable, certainly unreasonable. For the company's own benefit, it should have trained substitute or temporary or weekend foremen. Almost any other plant in our industrial nation would have been operated with substitutes for foremen who had to be off. Almost any other plant in this nation would have had trained men ready to step in when needed. Not this defendant. This defendant claims undue hardship in accommodating this plaintiff's religious belief, but if it had simply acted in its own interest and had trained men ready to substitute, the accommodation would have been simplicity itself.

If Mr. Lake had remained a member of the bargaining unit, he would have had no problem. The labor-management agreement provides that no one in the bargaining unit can be forced to work on Saturday or Sunday. Time and a half is paid on Saturday, and double time on Sunday, so that if a workman wants to make extra money, he can

voluntarily do so. If he wants the time off, he has an absolute right to it. The evidence shows that the best attendance on a Saturday is somewhere in the 60-70 per cent range, and that it is necessary to use large numbers of men at jobs they do not normally hold and which they do not really know. This is from the company's own evidence when it tried to prove the necessity of the foremen being there on Saturday. It is unusual indeed for an employer to treat its foremen so much worse than it treats its workmen. Mr. Lake's religious faith problem could have been easily accommodated by allowing him to return to the bargaining unit. This opportunity was never offered him. He would have accepted it. His actual pay would have been practically the same, perhaps even more. Since he is a Sabbatarian, he has no problems of conscience with working on Sunday. Sunday work is paid at double time.

The company argues that they have had an understanding for 20 years with the union that no personnel from management will revert to the bargaining unit except as a result of a reduction in force, and then that person will remain in the bargaining unit only so long as absolutely necessary. When an opening is again available within the ranks of management, that person is to be placed back in such a position. However, the evidence also shows that the union has been very flexible and reasonable in granting waivers of such contract provision. For example, the contract provides that a bargaining unit man can act as a foreman for no more than 90 days without being made permanent as part of management. At least one of the witnesses obtained five waivers of this rule so that he worked a year and a half as a temporary foreman! It is enough to say that the company made no effort to discuss this with the union and get the union's permission for Mr. Lake to revert to the bargaining unit permanently. When the "understanding" began about 20 years ago, the 1972 amendment to Title VII concerning religious accommodation had not been enacted into law. The union has been

so reasonable and flexible on other matters, it would be a surprise indeed for the union to refuse to allow Lake to accommodate his religious beliefs by becoming an hourly worker again. Lake testified that he would still be willing to do this and had always been willing to do so. The court credits this testimony.

There is at least one other way the company could easily have made an accommodation for Mr. Lake. The testimony shows his immediate supervisor begged him to work on Saturday before his termination the following Monday, if he did nothing but walk around with his hands in his pocket, because he was near to working out a solution. He said that within two weeks he would have a solution if Lake would just work that one more Saturday. The implication apparently was that he was going to be fired if he did not work that Saturday, but if he would work that one time a solution was in view. The evidence never disclosed what the possible or probable solution would have been. Lake, true to his conscience and his religious beliefs, refused to work on his sabbath. There was much said in the evidence about the circumstances of that last weekend in July 1983. However, most of this is immaterial. He was not fired for a failure to report on his success in obtaining someone to cover for him. The burden was put on him to find someone to cover. The company had made some effort to accommodate previously, although the court finds the effort to fall short of that required by law. In the end, however, the company put the burden entirely on Lake to find someone to cover for him if he could not personally be present. He was limited to finding this cover from among three fellow employees. It took two of these three, working an extra four hours each, to cover for Lake on Saturday. This last weekend he was unable to get two men to cover. He got half of the shift covered by one man. The court does not find him guilty of failure to give notice, for two reasons: first, he called the plant repeatedly in order to report the circumstances, and no one would

answer the telephone. The court credits this testimony. Secondly, the supervisor got the information at 3:00 p.m. on Friday, as Lake knew he would, from the employee who reported at that hour and planned to work for 12 hours. It was 3:00 a.m. to 7:00 a.m. on Saturday which was not going to be covered. At 3:00 p.m. on Friday, the supervisor knew it. It was not lack of information that got Lake fired. It was his persistent refusal to violate his conscience and his faith by working on the sabbath.

The third method of accommodation, which would have worked if Lake's supervisor was telling him the truth about being within two weeks of a solution, would have been to allow Lake to use his remaining days of vacation time on Saturdays, one day at a time. This is a permissible use under the company's methods of operation. There was also a floating holiday. In other words, Lake was entitled to choose a day to use as a holiday. He could have continued for six more Saturdays, using this combination of vacation days and the floating holiday, and could have easily been accommodated until the permanent solution was reached, which had been promised him.

The law puts the burden on the employer to make reasonable efforts to achieve an accommodation. The court's opinion after having heard all the evidence is that the company did not understand, or did not admit, that the duty to accommodate Lake's religious faith was on the company. The company transferred to burden to Lake. The company made no real effort, certainly not a good faith effort, to find an accommodation for this extremely valuable employee, whose attitude was always good, and whose work was always excellent. The only complaint the company had with his attitude was his very strong religious faith and his strength of conscience which refused to allow him to violate the principles of that faith.

The public policy of the United States has been declared by the Congress, and that is that the employer make every

reasonable effort to accommodate. There would have been no undue hardship to the employer to accommodate Lake in any of these three ways. The company complains that if Lake used his vacation days or his floating holiday on the next several Saturdays, they would have had to pay supervisors to work in his place, at a cost of some $17.00 to $25.00 per Saturday, or they would have had to ask the other two instrument foremen to work four hours each on each of those Saturdays in question. Whenever Lake took his floating holiday or his vacation days, that is exactly what the company would have had to do anyway. There would have been no burden on the company. The only "burden" on the company would have been exactly the burden that would have been on the company whenever he took those days. Able counsel for the defendant has put a very good face on what the company did in the defendant's briefs. Nevertheless, this court finds from the evidence that there was a distinct lack of sympathy for Mr. Lake's religious view and that the company did not make a good faith effort to accommodate that view. The company had a "don't care" attitude.

Ironically, under the present organization of the defendant's plant, it would be easy to solve Mr. Lake's problem. One of the shifts never works on Saturday. If he were assigned to that shift, the problem would be gone.

This court has never been offered a good reason why the company and the union should have an understanding which makes it impossible for a foreman to go back to the bargaining unit. There is an obligation on the part of both the company and the union to make reasonable efforts to accommodate religious principles of the kind at issue in this case. Of course, the union is not a party, which makes it impossible for this court to order that the union accept Lake back in the bargaining unit. The court, however, can order that the company make an effort, and the court expects that the union will in good faith consider a request from the company, since the union also has an

obligation to make a reasonable effort to arrive at an accommodation.

The court will order Mr. Lake returned to the position of electrical/instrument maintenance foreman and assigned to the shift which does not work on Saturday. The court will consider any motion that may be filed to return him to the bargaining unit, if the company finds that the union indeed will consider allowing this, and if there is good reason to prefer this solution to the order to return him as a foreman and place him on the shift which never works on Saturday. The court will not prejudge such a motion, but will give it consideration if it is filed in the light of the facts and circumstances which are presented to the court at that time. The court will order that Mr. Lake be given permanent relief in one of these two ways, or perhaps in some combination of them.

The court will be interested, if the company wants to file such a motion, in a motion proposing the "permanent solution" which Lake's supervisor told him in July 1983 he was within two weeks of working out for him. The court has not considered this because the court does not know what it was. The court will also consider any alternate proposal made by motion to give Mr. Lake relief, except that the court will not reconsider the various proposals already made and not adopted in this order. It may be, however, that one or both of the parties can propose a better solution than the one the court has come up with, and the court is open minded enough to consider it when and if it is filed.

A separate order in conformity with the foregoing memorandum opinion will be entered.

DONE this the 26th day of August 1986.

/s/ J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

THOMAS HAROLD LAKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 85-G-0628-W
B. F. GOODRICH COMPANY,	)	
	)	
Defendant.	)	

ENTERED
AUG 26 1986
FILED
AUG 26 1986

JUDGMENT ORDER

In conformity with and pursuant to the memorandum opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that judgment be and it hereby is entered in favor of the plaintiff, Thomas Harold Lake, and against the defendant, B. F. Goodrich Company; and it is

FURTHER ORDERED that the plaintiff, Thomas Harold Lake, be returned to the position of electrical/instrument maintenance foreman and assigned to a shift which does not work on Saturday, or, alternatively, returned to an instrument mechanic job in the bargaining unit; and it is

FURTHER ORDERED that plaintiff recover of the defendant all back pay and benefits due him from the date of his termination to the date of his reinstatement with the defendant company, together with attorneys' fees and costs.

The parties are ORDERED to attempt to agree on the specific job to which Mr. Lake will be assigned and on the amount of back pay award. If there is an inability to agree within twenty (20) days, each party shall submit to the court within ten (10) days of that date its version of a proposed order together with a brief explaining its position.

DONE and ORDERED this 26th day of August 1986.

/s/ J. FOY GUIN, JR.
United States District Judge
J. FOY GUIN, JR.

APPENDIX C

United States Court of Appeals,
Eleventh Circuit.

Nos. 86-7671, 86-7772.

THOMAS HAROLD LAKE,
Plaintiff-Appellee,

v.

B.F. GOODRICH COMPANY,
Defendant-Appellant.

Feb. 11, 1988

Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

Filed March 21, 1988
(Opinion February 11, 1988, 11 Cir., 1988, F.2d). (March 21, 1988)

Before HILL and VANCE, Circuit Judges, and PROPST*, District Judge.

PER CURIAM

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

---

* Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT B. PROPST
United States Circuit Judge

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE B.F. GOODRICH COMPANY,

Petitioner,

v.

THOMAS HAROLD LAKE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent Lake believes that the Questions Presented by the Petitioner B.F. Goodrich in its Petition for a Writ of Certiorari do not accurately state the issues of this case. Lake submits that the following questions more accurately describe the issues to be considered by this Court.

I. Based on the witnesses and testimony at trial, were the District Court's findings, and the Eleventh Circuit's affirmance that Goodrich "made no real effort, certainly not a good faith effort, to find an accommodation for this employee," and that "there would have been no undue hardship to [Goodrich] to accommodate" Lake, clearly erroneous?

II. Were the District Court's ruling, and the Eleventh Circuit's affirmance that Goodrich discriminated against Lake because Goodrich "made no real effort, certainly not a good faith effort, to find an accommodation for this employee," and that "there would have been no undue hardship to [Goodrich] to accommodate" Lake, consistent with this Court's holdings in *Ansonio Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 107 S.Ct. 367 (1986), and *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), that an employer must offer a reasonable accommodation of an employee's religious beliefs so long as it does not incur an undue hardship?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2064

THE B.F. GOODRICH COMPANY,

Petitioner,

v.

THOMAS HAROLD LAKE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The decision of Judge J. Foy Guin, Jr. of the United States District Court for the Northern District of Alabama, finding that Goodrich discriminated against Lake on the basis of religion, is not reported and appears in Goodrich's Appendix B at 11. The opinion of the Court of Appeals for the Eleventh Circuit, affirming the District Court, is reported at 837 F.2d 449 (11th Cir. 1988) and appears in Goodrich's Appendix B at 1. The denial by the Eleventh Circuit of Goodrich's Petition for Rehearing and Suggestion for Rehearing *en banc* is unreported and appears in Goodrich's Appendix C at 20.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) provides:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

SUMMARY OF ARGUMENT

In Title VII cases the District Court's findings on discrimination may not be reversed unless the appellate court concludes that the findings are clearly erroneous. *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). If the District Court's account of the evidence is plausible, then the appellate court may not reverse the decision even though the appellate court might be convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. *Id.* at 574.

Most of the facts in this case pertaining to religious accommodations were controverted. These factual disputes were fully explored in a four-day trial and decided in

favor of Lake. The District Court concluded that Goodrich "made no real effort, certainly not a good faith effort, to find an accommodation for this employee" and that "there would have been no undue hardship to [Goodrich] to accommodate" Lake. Given the unique opportunity of the District Court to hear and observe the testimony and Goodrich's "don't care attitude" toward accommodating Lake, the Court of Appeals was correct in holding that these findings are not clearly erroneous.

The District Court's ruling, and the Eleventh Circuit's affirmance, are entirely consistent with this Court's decisions in *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), and *Ansonia Bd. of Educ.* v. *Philbrook*, 107 S.Ct. 367 (1986). *Hardison* and *Philbrook*, taken together, require that an employer offer a reasonable accommodation of an employee's religious beliefs so long as the employer does not incur an undue hardship. *Philbrook*, 107 S.Ct. at 372. The District Court's findings that Goodrich "made no real effort, certainly not a good faith effort, to find an accommodation for this employee" and that "there would have been no undue hardship for [Goodrich] to accommodate this employee" is entirely consistent with, and faithful to, both *Hardison* and *Philbrook*. The District Court also found that the cost to Goodrich of accommodating Lake would not have amounted to an undue hardship, consistent with the *de minimus* cost standard articulated in *Hardison*. Thus, Goodrich failed to comply with the requirements of *Hardison* and *Philbrook*.

Finally, this case neither creates an intercircuit conflict, nor does it present any novel question of federal or constitutional law requiring review by this Court. Thus, the Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Lake charged that Goodrich failed to provide a reasonable accommodation of his religious beliefs and fired him because of those beliefs in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

Lake was hired by Goodrich in 1976 to work at its Tuscaloosa plant as an instrument mechanic. He became a member of the collective bargaining unit. Under the collective bargaining agreement, union members worked a 40-hour workweek, Monday through Friday, and had an absolute right to refuse all overtime. In 1979 Lake was promoted to an electrical instrument foreman's position because, according to a company witness, he "exemplified what [Goodrich] was looking for in an employee, as far as motivation, getting out there, wanting to get the job done." As a foreman, however, Lake was no longer protected by the overtime provisions of the collective bargaining agreement.

In 1981 Lake and his wife decided to become members of the Seventh-day Adventist Church. The church teaches that one should not work from sundown Friday to sundown Saturday. At the time of his conversion, Lake was working on the third shift from 3:00 p.m. until 11:00 p.m. He was thus scheduled to work during part of his Sabbath.[1]

Lake had delayed joining the church until he could arrange to be off work during the Sabbath hours. When he advised Goodrich of his need for a religious accom-

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[1] There is no dispute that Lake's religious beliefs were sincere, and that he established a *prima facie* case of religious discrimination under Title VII. *Lake* v. *B.F. Goodrich Co.*, 837 F.2d 449, 450 (11th Cir. 1988).

modation, his supervisor told Lake that while he felt sorry to lose a good man, it would be difficult to move people around. Lake's schedule was not altered at that time.

In February, 1982, Lake began working a midnight shift of plant area III as a result of a job opening, enabling him to avoid working on Sabbath. The transfer was not an attempted accommodation by the company. In fact, no one from the company contended that this transfer was an attempt to accommodate Lake's religious beliefs. The trial court also received testimony from Luther Pardue, the foreman transferred from the midnight shift, who stated that the transfer was not an attempt by the company to accommodate Lake's religious beliefs, but merely the result of Pardue's own request to work the day shift.

On at least two other occasions Lake specifically informed Goodrich of his Sabbath beliefs and a need for an accommodation. At no time did anyone in the company indicate that there would be a problem respecting Lake's work schedule.

In March of 1983, Goodrich commenced production weekends; requiring an intermittent seven day work-week. The resulting seven-day workweek conflicted with Lake's Sabbath beliefs. He promptly informed Nelson, his supervisor, that he could not work during his Sabbath hours. Lake suggested he would be willing to trade with other employees in exchange of Sunday work for Saturday work. Management's reply was "It's your problem. You handle it." On July 19, 1983, Mr. Duncan, the manager of maintenance, told Lake that the company would not ask employees to cover for Lake on his Sabbaths and that it was Lake's responsibility either to be on the job or to provide suitable coverage. It was Lake's understanding

that the company was willing to do nothing at all to accommodate him.

Lake was able to arrange only partial coverage for his shift on Saturday, July 23. He tried repeatedly, yet unsuccessfully, to notify his supervisor of this fact by phone. Later, on the 23rd, Goodrich indefinitely suspended Lake because he did not work on the Sabbath. The record did not show that there had been any specific problem or costs to the company directly attributable to Lake's absence from work on July 23. There were only five production Saturdays up to the time of Lake's termination.

Testimony before the District Court by Mr. Tucker, Goodrich's personnel director, revealed that Tucker asked Lake on July 26: "Are you going to work this next Saturday during the seven-day workweek?" Lake's religious convictions required him to answer: "No, sir, I will not." Mr. Tucker replied: "In that case, you leave us no alternative but to terminate you." Lake was fired on July 26, 1983.

At no time did Goodrich seriously consider any accommodation for Lake. Many alternatives existed, however. For example, use by Lake of vacation time on his Sabbaths was never suggested by Goodrich, even though normal company policy allowed other foremen in the same craft to cover for an employee who was on vacation. It was not unusual for only one foreman to work in a section of the plant during a particular shift while the other foreman was on vacation. For example, when another foreman, Mr. Rawlins, suffered a back injury, Lake singlehandedly covered his shift for two or three weeks. No similar accommodation was ever offered to Lake.

Another option which Goodrich never attempted nor explored was returning Lake to his position as an hourly

employee, which Lake would have been willing to accept. Company witnesses testified that there was an unwritten "understanding" between Goodrich and the union that no personnel from management would revert to the bargaining unit except as a result of reduction in force.

Any difficulty in returning Lake to an hourly employee's position, however, did not stem from the provisions of any collective bargaining agreement. No witness from the union was even called by Goodrich to testify as to such an understanding, and Goodrich admitted at the trial that that it never even contacted the union about Lake returning to the bargaining unit. The trial court found that "the evidence also shows that the union has been very flexible and reasonable in granting waivers of such contract provisions." Although the contract itself provided that a bargaining unit man can act as a foreman for no more than 90 days without being made permanent as part of management, Goodrich had arranged with the union to waive the 90-day requirement with regard to at least two other employees when it served the company's interest. The District Court found that "at least one of the witnesses obtained five waivers of this rule so that he worked a year and a half as a temporary foreman!" However, Goodrich never made any effort to obtain any waiver from the union of the so-called unwritten "understanding" as to a foreman's return to the bargaining unit as a means of accommodating Lake's religious needs.

In this case, it was not a situation where a seniority-based shift bidding system would have been cirumvented by Lake's return to the bargaining unit. All members of the bargaining unit had the right to refuse Saturday and Sunday overtime. Lake's doing so would in no way affect any other employee's schedule. The only possible argument that might have been made on this point is that the

most junior employee could have been bumped out of a job if Lake were returned to the bargaining unit. However, the record shows that Lake was terminated at a time when the plant's work force was expanding. There is absolutely no evidence in the record to show that any other employee would be adversely affected in any way by Lake's return to the bargaining unit.

Unlike management here, in *Hardison* Trans World immediately involved the union in the process of attempting an accommodation and even sought a waiver of the seniority provision which was an obstacle to accommodation. *Hardison*, 432 U.S. at 77-78. In this case, no waiver of a seniority provision was necessary. At most, only a waiver of the extra-contractual understanding regarding the return of foremen to the bargaining unit would have been necessary from the union.

No one from Goodrich indicated that the company sought to find other employees with substantially similar qualifications to those possessed by Lake so as to cover for Lake on those few sporadic occasions when he was scheduled to work during his Sabbath hours. In fact, when John Allen, plant manager of Goodrich's Tuscaloosa plant, was questioned at the trial about whether there was any reason why he would oppose having a survey of other foremen as to possible alternative coverage for Lake's Sabbath, Allen testified that he did not object to the maintenance manager's statement that Goodrich was not going to assist in coverage for Lake since "that's his discretion as a manager." Rather than search for a replacement, Goodrich attempted to limit the pool of replacements for Lake to two employees. The record, however, demonstrates other employees were qualified to cover for Lake.

Testimony by Goodrich witnesses also proved that Goodrich had never spoken with the production superintendent about the possibility of Lake being transferred to the production department as a production foreman. The record indicates that management was aware of various vacancies but no lateral transfers were ever considered. The plant manager testified that he did not think it necessary to do anything other than attempt to find a shift or area position for Lake as an engineering foreman.

The plant manager admitted that on numerous occasions Goodrich operated its plant with only one foreman in area III, the area of the plant in which Lake was one of two shift foremen. He also testified that the utilization of a single engineering foreman on the first shift in area III did not in any way jeopardize the safety of the employees at the plant.

Mr. Allen, succinctly stated the company's unwillingness to offer Lake any accommodation when he testified that "it's an employee's obligation to come to work his scheduled hours" and that any responsibility for working out an arrangement to cover an employee's religious needs rested with the employee rather than with management. Mr. Duncan confirmed Goodrich's policy by telling Lake, "It's your problem. You handle it."

Based on four days of testimony, the District Court found that Goodrich had a "don't care attitude" toward accommodating Lake. It held that Goodrich discriminated against Lake because of his religion in violation of 42 U.S.C. § 2000e, *et seq*. On appeal a two-member majority of the Court of Appeals for the Eleventh Circuit was persuaded that the District Court's decision was correct. That decision, in turn, was reviewed by all members of the Eleventh Circuit, who decided not to rehear the decision.

REASONS FOR DENYING THE WRIT AND ARGUMENT

According to Supreme Court Rule 17.1, this Court grants *certiorari* when one of the following "special and important" reasons exist in a case presented to the Court:

1. When a federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court, or

2. When a conflict between the Circuits is created by a decision of a federal court of appeals, or

3. When a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by the Court.

Clearly this case does not warrant review on any of these grounds. The District Court's findings are not clearly erroneous, but rather are based on a highly plausible view of the evidence. The decision and the Eleventh Circuit's affirmance are consistent with both this Court's prior holdings in *Hardison* and *Philbrook*, and the plain meaning of 42 U.S.C. § 2000e, *et seq*. This case poses no important question of federal law which has not already been settled by this Court, nor does it create any conflict between the Circuits. Finally, the decision below turns upon its own distinct set of facts and thus will not affect others than the litigants.

In Title VII cases a District Court's findings on discrimination may not be reversed unless the reviewing court concludes that the findings are clearly erroneous. *Anderson*, 470 U.S. 564 (1985), *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). Specifically, the District Court's findings regarding the efforts of Goodrich at accommodation and claimed undue hardship, if any, can only be overturned if they are clearly erroneous. *Wisner* v. *Truck Central*, 784 F.2d 1571 (11th Cir. 1986).

Thus, the District Court's findings that Goodrich "made no real effort, certainly not a good faith effort, to accommodate this employee," and that "there would have been no undue hardship to [Goodrich] to accommodate" Lake cannot be reversed as clearly erroneous unless this Court is left with "the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573. If the District Court's account of the evidence is plausible, this Court may not reverse even though it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Anderson*, 470 U.S. at 574.

Lake argued—and the Court of Appeals agreed—that the District Court's decision was not clearly erroneous because it was based upon a highly plausible view of the evidence: that Goodrich discriminated against Lake in violation of Title VII because it refused to offer any reasonable accommodation of Lake's religious beliefs. Not only did the District Court decide in favor of Lake, but a two-member majority of the Court of Appeals for the Eleventh Circuit was also persuaded that this view of the evidence was not clearly erroneous. The matter also received an *en banc* review by all members of the Eleventh Ciruit, who decided not to rehear the case.

Reading Judge Hill's dissenting opinion (relied upon by Goodrich in its Petition at pages 5-6), one could be easily misled into concluding that the accommodations reviewed there were actually offered by Goodrich. In fact, the existence of each of the imagined accommodations of the dissent was denied by Lake and was the subject of conflicting testimony. The District Court, reviewing this evidence first hand, ultimately resolved these evidential disputes in Lake's favor.

Illustrative of this misconception, Judge Hill suggested that Goodrich arrange a transfer to the first shift to accommodate Lake's beliefs. However, testimony from Luther Pardue received at the trial indicates that religous accommodation had noting to do whatsoever with this transfer. Rather, the transfer occurred after Pardue, a foreman who had been working the first shift, requested to transfer to the day shift. The vacancy happened coincidentally and had nothing to do with the company attempting an actual accommodation. Goodrich can hardly cite this action as evidence of accommodation, when in fact the transfer was completely unconnected to Lake's situation.

Goodrich's Petition also pointed to Hill's dissent for the proposition that Goodrich exempted Lake from work on at least 49 Saturday maintenance days during 1982 and 1983. The trial record, however, shows that Goodrich did nothing at all in this regard, since on Lake's shift (the first shift) the foremen *never* worked maintenance Saturdays because they were required to work start-up every Sunday instead. The dissent's suggestion that Goodrich scheduled other foremen to work twelve-hour shifts and paid them premium wages to cover for Lake on Fridays and Saturdays is also misleading. In fact, as the record demonstrates no such premium wages were paid, since *both* Lake and any foreman whom Lake arranged to cover for him were paid the same overtime rate to work on Saturday. The difference in each foreman's overtime rate was *de minimus*, as the evidence clearly showed.

Other purported accommodations cited by Goodrich from Judge Hill's dissenting opinion, included:

> * Advising [Lake] that it was willing to consider any reasonable alternatives he could propose;
>
> * Allowing [Lake] to obtain replacements for himself to cover portions of his shift;

* Holding several meetings among managers and supervisors to discuss potential methods of accommodation.

In response before the District Court, Lake contended that, even if Goodrich advised him that it was willing to consider any reasonable alternatives he proposed, such a position was rendered meaningless because Goodrich (1) shifted the entire burden of solving this problem onto his shoulders and (2) always rejected any accommodation which Lake did propose. Allowing Lake to obtain replacements for himself meant nothing when, at the same time, Goodrich informed Lake that the company would do nothing further, took no active role, and advised Lake that he bore sole responsibility for working out a solution. Finally, the trial record shows that the meetings which Goodrich cites as evidence of its efforts at finding "potential methods of accommodation" were merely meetings where Lake was told by his supervisors that accommodation was "[his] problem." As the record shows, the final meeting held between Lake and his supervisors was actually the meeting at which Lake was fired. These actions hardly constitute reasonable accommodation under existing law.

Each of the other so called accommodations appearing in the dissent either never occurred or were similarly contested by Lake in the four-day trial before Judge Guin. The trial court having heard all of the evidence resolved these factual disputes in favor of Lake. Goodrich's reliance on Hill's dissent seeks to retry these factual issues *de novo*, directly contrary to this Court's holding in *Anderson*. The District Court's view of the evidence cannot be clearly erroneous because its findings are surely a permissible and highly plausible view of the evidence.

This Court, in applying the clearly erroneous standard, must also give "due regard . . . to the opportunity of the

trial court to judge the credibility of the witnesses," especially when findings are based on determinations regarding the credibility of witnesses. *See* Rule 52(a) of the Federal Rules of Civil Procedure; *Anderson*, 470 U.S. at 573.

The District Court was in the best position to observe the Goodrich management testimony at the trial, which testimony at times directly conflicted with other testimony itself. Surely the facts as they unfolded, and Goodrich's "don't care" demeanor both contributed to the District Court's conclusion that Goodrich "made no real effort, certainly not a good faith effort, to accommodate Lake" and that "there would have been no undue hardship for [Goodrich] to accommodate this employee." Given the opportunity of the District Court to judge the credibility of the many witnesses in this case, its ruling is a highly plausible view of the evidence. The Eleventh Circuit was also correct in holding that the decision was not clearly erroneous. Even if the Supreme Court might weigh the evidence differently, the District Court's decision was not clearly erroneous.

The District Court's ruling, and the Eleventh Circuit's affirmance, are also consistent with this Court's prior holdings in *Hardison* and *Philbrook*. *Philbrook* requires that an employer offer an employee a reasonable accommodation of the employee's religious belief. The District Court's ruling that Goodrich "made no real effort" to accommodate Lake necessarily leads to the conclusion that Goodrich failed to meet its burden under *Philbrook* that it offer a reasonable accommodation to the employee. To the contrary, Goodrich did nothing to accommodate Lake. *Philbrook* also advocates "bilateral cooperation" between an employer and employee in the search for an accommodation of an employee's religious beliefs. *Phi-*

lbrook, 107 S.Ct. at 372. However, as both the District Court and the Eleventh Circuit correctly recognized, the only party willing to cooperate in the search for an accommodation was Lake. Lake was even willing to take an *unpaid* leave of absence in order to give himself and Goodrich time to develop an accommodation. Yet Goodrich, with a payroll in excess of $44 million at its Tuscaloosa plant in 1983, "made no real effort to accommodate" Lake. Rather than cooperate in the search for an accommodation with Lake, Goodrich fired him.

The District Court's ruling, and the Eleventh Circuit's affirmance, that "there would have been no undue hardship to [Goodrich] to accommodate" Lake, are also consistent with *Hardison*. *Hardison* holds that an employer is not required to bear an undue hardship in attempting to accommodate an employee's religious beliefs. The District Court made specific findings about the added cost to Goodrich of an accommodation of Lake, finding that those costs were so insubstantial as to constitute "no burden on the company," consistent with the *de minimus* cost standard in *Hardison*.[2] (See Goodrich's Appendix B at 18)

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[2] The District Court correctly realized that Lake did not request that Goodrich override the seniority provisions of its labor contract, consistent with *Hardison*. This case *does not* involve seniority provisions at all, but rather calls into question why Goodrich sought waivers of the collective bargaining agreement for at least two employees who wished to remain temporary foremen covered by the agreement, but did not seek a waiver for Lake. The inconsistency of Goodrich's efforts to seek waivers from the union may constitute a further act of discrimination against Lake. A benefit "'that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.'" "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." *Philbrook*, 107 S.Ct. at 373, quoting *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984).

Thus, the District Court's opinion, and the Eleventh Circuit's affirmance are consistent with both *Philbrook* and *Hardison*. Nor does the decision conflict with any other Supreme Court ruling.

Also, no intercircuit conflict exists which would warrant granting certiorari. None of the four cases relied upon by Goodrich at page 11 of its Petition conflicts with the decision in this case. For example, *EEOC* v. *Ithaca Industries, Inc.*, ___ F.2d ___, 46 FEP Cases 1730 (4th Cir. 1988), has been reversed on rehearing *en banc* subsequent to the filing of Goodrich's brief. In reversing *Ithaca*, the Fourth Circuit has held exactly what both lower courts in the case at bar have required: that an employer who makes no specific effort to accommodate an employee's religious beliefs violates both *Hardison* and the plain meaning of 42 U.S.C. § 2000e, *et seq. Ithaca*, 46 FEP Cases 1730, at 1731 (1988).

The other three cases cited by Goodrich as in conflict are factually different or otherwise not germane to this case. Here, unlike *Turpen* v. *Missouri-Kansas-Texas R.R.*, 736 F.2d 1022 (5th Cir. 1984), Lake is not asking Goodrich to override a seniority provision of any labor agreement. Lake sought an accommodation. He asked Goodrich, among other things, to do what it did for at least two other employees on numerous occasions: seek a waiver from the union. Nor do *Brener* v. *Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982), or *United States* v. *City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976), conflict with the Eleventh Circuit's decision. In both *Brener* and *City of Albuquerque*, the employer did make a reasonable effort to accommodate the employee's religious beliefs, such as offering a flexible shift scheduling system, actively encouraging and assisting in the trading of schedules between employees, *see Brener*, 671

F.2d at 145, and allowing employees to take vacation leave on their religious days, or allowing employees to take unpaid leave *See City of Albuquerque*, 545 F.2d at 113. None of these options was tried by Goodrich. To the contrary, the District Court found that Goodrich made no real effort to accommodate Lake.

Thus, these four cases have no bearing on the instant matter. Nor are they even applicable to the issues in *Lake*.

Neither does this case present any novel question of constitutional law on which to grant certiorari. Both *Philbrook* and *Hardison* provide informative guidance on resolving the fact-specific issues that arise under 42 U.S.C. § 2000e, *et seq*. An employer must offer an employee a reasonable accommodation or prove that any such accommodation causes the employer an undue hardship. The decisions below are consistent with *Philbrook* and *Hardison*. The Eleventh Circuit opinion confirms a fact-specific decision of the trial court. Thus, there are no novel questions of constitutional law to be resolved.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari must be DENIED.

Respectfully submitted,

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